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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NATHAN DANIEL,

Plaintiff and Appellant,

v.

CRAIG S. LATHEN et al.,

Defendants and Respondents.

B203799

(Los Angeles County
Super. Ct. No. BC337962)

APPEAL from orders of the Superior Court of Los Angeles County. Paul Gutman, Judge. Reversed and remanded.

Law Offices of Joseph W. Singleton and Joseph W. Singleton for Plaintiff and Appellant.

Law Offices of Kwaku Duren and B. Kwaku Duren for Defendants and Respondents.

Plaintiff Nathan Daniel (Daniel) appeals from orders (1) setting aside a default judgment he obtained against defendants Craig and Brenda Lathen (collectively the Lathens) based on Daniel's failure to file a separate statement of damages under Code of Civil Procedure section 425.11, and (2) vacating a Los Angeles County Sheriff's Department's sale (sheriff's sale) of the Lathens' home to satisfy that default judgment.¹ He contends the failure to file a separate statement of damages is not a proper ground for setting aside the default judgment. We reverse the order vacating the default judgment and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

According to Daniel's amended complaint, Daniel and the Lathens had been next door neighbors for several years when, in September 2003, Daniel requested that the Lathens relocate where they chained their three dogs at night (under Daniel's bedroom window) because the dogs' barking was disturbing Daniel's sleep. The Lathens responded with verbal threats invoking Daniel's race and religion. The complaint's first and third causes of action for terrorist threats and intentional infliction of emotional harm, respectively, sought damages in an amount to be shown at trial; the second cause of action for violation of Civil Code sections 51.7 [freedom from violence or intimidation], 52 [damages for denial of civil rights], and 52.1 [civil action for denial of civil rights], sought damages in a specified amount.

The Lathens failed to respond to the complaint, and their default was entered on November 23, 2005. After the trial court heard evidence of damages at an ex parte prove-up hearing on January 20, 2006 (§ 585, subd. (b)), it entered judgment against the Lathens in the amount of \$407,423.58, the details of which we discuss later in this opinion. Notice of Entry of Judgment was filed on March 23, 2006.

¹ All future undesignated statutory references are to the Code of Civil Procedure.

One year later on May 16, 2007, the trial court granted Daniel's application for an order to sell the Lathens' home to enforce the money judgment.² The Lathens tried but failed to stop the sale, the sale took place on July 25, 2007. Daniel apparently purchased the property.

On August 28, 2007, the Lathens filed a motion to vacate the default judgment.³ One of several grounds for the motion was that "no '*statement of damages*' or '*proof of service thereof*' was filed or personally served" on the Lathens prior to entry of default as required by section 425.11, subdivision (c) and section 580.⁴ Following a hearing on September 14, 2007, the trial court vacated the default judgment, observing that no statement of damages had been served on the Lathens (the September 14 order). It denied Daniel's motion for rehearing and struck his satisfaction of judgment and memorandum of costs.

After the trial court set aside the default judgment, the Lathens moved to set aside the sale of their residence. On November 15, 2007, the trial court granted the motion (the November 15 order). According to the written order filed on November 30, 2007, "the Sheriff's Sale in the herein matter is hereby set aside and vacated, pursuant to C.C.P. § 701.680(b)(c)(1) & (2), on the grounds that the herein judgment has been vacated, that

² During the intervening year, Daniel commenced a second lawsuit against the Lathens which alleged similar conduct by the Lathens occurring in January and August 2006 (case No. BC352820). Efforts at a "global settlement" of this case and case No. BC352820 failed. We do not address the second case.

³ This was the Lathens' second motion to vacate the judgment. In March 2007, the Lathens filed a motion on the grounds that their default was taken as the result of mistake or excusable neglect in that they relied on their attorney to file a timely response to the complaint, but she failed to do so. The trial court denied that motion.

⁴ A few weeks before, the Lathens filed a verified complaint commencing a new action against Daniel seeking to set aside the judgment in this case and to enjoin the sale of their home (case No. BC375880). The trial court found this case, an unlawful detainer action case No. 07-U-09807 and case No. BC375880, to be related cases, and the parties stipulated to consolidating case No. BC352820 with this case. We grant the Lathens' request to take judicial notice of various pleadings in the consolidated case.

there were irregularities in the proceedings because the property sold was not subject to execution, and that the defendants are in all respects entitled to have the herein sale of their residence set aside.”

Daniel filed timely notices of appeal from the September 14 and November 15 orders.

DISCUSSION

1. Daniel Was Entitled to a Default Judgment in an Amount That Did Not Exceed the Damages Alleged in the Complaint

Daniel contends the trial court erred in setting aside the default judgment on the ground that Daniel had not served a separate statement of damages on the Lathens. He argues that the allegations of the complaint were sufficient to satisfy section 425.11, subdivision (c) and section 580. We conclude that the default judgment was properly vacated because it exceeded the demand in the complaint, but that the proper remedy is to enter a new judgment in an amount within the damages alleged by the complaint.

We begin with the relevant statutes: section 425.11, subdivision (c) requires that in certain tort actions, before a defendant’s default may be taken, the plaintiff must serve a statement setting forth the nature and amount of damages being sought. If the defendant has not appeared in the action, the statement must be served in the same manner as a summons. (§ 425.11, subd. (d)(1).) Regarding punitive damages, section 425.115, subdivision (g)(1) provides: “If the party has not appeared in the action, the statement [described in subdivision (a) reserving the right to seek punitive damages in a stated amount] shall be served in the same manner as a summons” Section 580, subdivision (a) provides that, if there is no answer to a complaint, the relief granted cannot exceed that demanded in the complaint or the statement required by sections 425.11 or 425.115.

These statutes “ ‘aim to ensure that a defendant who declines to contest an action does not thereby subject himself to open-ended liability. . . . [T]he Courts of Appeal have consistently read the code to mean that a default judgment greater than the amount

specifically demanded is void as beyond the [trial] court’s jurisdiction. [Citations.]’ [Citation.]” (*Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1136.) But “failure to give notice under . . . section 425.11 is not fatal if the allegations in the complaint give sufficient notice to the defendants of the damages sought.” (*Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, 1297 (*Cummings*), citing *Greenup v. Rodman* (1986) 42 Cal.3d 822, 830 (*Greenup*).)

When a default judgment awards damages in excess of the amount pled, the appropriate remedy is to modify the judgment to the maximum amount warranted by the complaint. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1748-1751 (*Ostling*) [where default judgment exceeds amount of damages alleged in complaint, appropriate remedy is to reduce damages to the amount alleged in the complaint]; see also *Greenup, supra*, 42 Cal.3d at p. 830 [where complaint sought “ ‘amount that exceeds the jurisdictional requirements of this court,’ ” compensatory award is properly reduced to the jurisdictional amount].)

In *Cummings*, Occupation Medical Corp. (OMC) cross-complained against Cummings for fraud; the cross-complaint specified that it sought punitive damages “ ‘in an amount in excess of \$2,000,000.00.’ ” (*Cummings, supra*, 10 Cal.App.4th at p. 1296.) After Cummings’ answer to the cross-complaint was stricken as a discovery sanction and Cummings’ default was entered; the trial court awarded OMC a judgment that included \$1 million in punitive damages. The appellate court affirmed, reasoning that the allegations of the complaint were sufficient to satisfy section 425.11 even without a formal notice under that code section. (*Cummings*, at p. 1297; see also *Uva v. Evans* (1978) 83 Cal.App.3d 356, 360-361 (*Uva*) [where complaint specifically requested \$30,000 in general damages, default judgment in that amount did not violate § 425.11].)

In *Ostling, supra*, 27 Cal.App.4th 1731, the court distinguished between vacating a default judgment and setting aside the default underlying the judgment. In that case, the plaintiff’s complaint alleged \$50,000 in actual damages, to be trebled according to statute, but after the plaintiff obtained the defendant’s default, the trial court awarded \$150,000 in special damages, without regard to the statutory multiplication of damages.

The trial court granted the defendant's motion to vacate and set aside the judgment. The appellate court reversed, holding that the trial court properly vacated the default judgment because it exceeded the amount stated in the complaint (*id.* at p. 1742), but erred in setting aside the default underlying the judgment. (*Id.* at p. 1743.) Rather, the appropriate remedy was to modify the judgment to the amount stated in the complaint. (*Id.* at pp. 1749 et seq.)

In *Julius Schifbaugh IV Consulting Services, Inc. v. Avaris Capital, Inc.* (2008) 164 Cal.App.4th 1393, the court held that a plaintiff whose default judgment is vacated because the relief granted exceeds the amount demanded in the complaint may be given the option of "accepting a reduced judgment or amending the complaint and putting the entire matter back at issue." (*Id.* at p. 1397, citing *Greenup*, *supra*, 42 Cal.3d at p. 830.)

Here, the second cause of action, paragraph 15 of the first amended complaint, alleges that the statutes upon which liability is based "provide civil penalties of up to 3 times actual damages plus punitive damages;" paragraph 16 alleges that Daniel suffered "damages of \$100,000 or an amount to be shown at trial;" paragraph 17 alleges Daniel "is entitled to statutory triple damages of \$300,000;" and paragraph 18 alleges he is entitled to "an award of punitive damages in an amount to be shown at trial." Regarding the second cause of action, the prayer for relief sought: "3. Compensatory damages of \$100,000 or an amount to be shown at trial; and [¶] 4. Statutory damages of \$300,000 or an amount to be shown at trial; and [¶] 5. Punitive damages in an amount to be shown at trial[.]" Thus, the Lathens were on notice that Daniel was seeking at least \$100,000 in actual damages. The trial court entered a default judgment in the amount of \$407,423.58, comprised of: \$7,423.58 (special damages); \$80,000 (general damages); \$320,000 (punitive damages); plus \$145.10 (costs).

Under *Greenup*, *Uva*, *Cummings*, and *Ostling*, because Daniel did not serve a statement of damages as required by sections 425.11 and 425.115, he was limited to recovering damages only up to the amount specified in his complaint: \$100,000 in actual

damages and \$300,000 in statutory damages.⁵ Because his complaint did not specify an amount of punitive damages, he could not, absent a statement of damages, rely on allegations of other elements of damages to rescue his failure to allege the amount of punitive damages sought. “It is irrelevant that the award of damages was within the total amount of compensatory and punitive damages demanded in the complaint. Since compensatory and punitive damages are different remedies in both nature and purpose, a ‘demand or prayer for one is not a demand legally, or otherwise, for the other, or for both.’ ” (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494-495.) Because there was no amount of punitive damages alleged in the complaint, the trial court properly vacated the judgment to the extent it included an award of \$320,000 in punitive damages. The proper remedy is not, however, to set aside the entire judgment, but to reduce it to an amount that does not exceed the \$100,000 actual damages specified in the complaint; i.e., the \$87,423.58 (combined general and special damages) awarded by the trial court, plus costs.

2. *The Order Vacating the Sheriff’s Sale*

Daniel contends the trial court erred in setting aside the sheriff’s sale. He argues that inasmuch as the order was based on the trial court’s erroneous belief that the default judgment was void entirely, the order itself is erroneous. We conclude that the trial court should have an opportunity, in the first instance, to reconsider all aspects of the appropriateness of the sheriff’s sale in light of our holding that the proper remedy is not to vacate the judgment unconditionally, but to modify it to \$87,423.58, plus costs.

DISPOSITION

The order unconditionally vacating the default judgment is reversed. The matter is remanded to the trial court to modify and reinstate the default judgment in the amount of \$87,423.58, plus costs, unless within 30 days after issuance of remittitur Daniel serves

⁵ The trial court awarded no statutory damages. Daniel does not contest this ruling on appeal.

and files in the trial court a notice electing to withdraw his request for default judgment and to request that the underlying default be set aside. If Daniel so elects, the Lathens will be entitled to file an answer and all issues, including liability, will be at large. The trial court shall make such further orders as are necessary with respect to the sheriff's sale consistent with this opinion. The parties shall bear their own costs on appeal.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.